

**BOARD OF APPEALS CASE NO. 5233**

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**BEFORE THE**

**APPLICANT: Mary E. Price**

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**ZONING HEARING EXAMINER**

**REQUEST: Variance to allow an existing retaining wall within the required front yard setback 3137 Birch Brook Lane, Abingdon**

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**OF HARFORD COUNTY**

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**Hearing Advertised**

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**Aegis: 2/20/02 & 2/27/02**

**HEARING DATES: April 8, 2002**

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**Record: 2/22/02 & 3/1/02**

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## **ZONING HEARING EXAMINER'S DECISION**

The Applicant, Mary Price, is requesting a variance, pursuant to Section 267-26C(4) and Section 267-26C(6) of the Harford County Code, to allow an existing retaining wall within the required front yard and recorded easement in an R2/Urban Residential District.

The subject parcel is located at 3137 Birch Brook Lane, within the subdivision of Woodland Run, and is more particularly identified on Tax Map 62, Grid 2A, Parcel 16, Lot 180. The subject parcel consists of 9,670± square feet, is zoned R2 and is entirely within the First Election District.

Mr. Michael Jolly appeared and testified that he lives at the subject address with the Applicant and was testifying on her behalf. The witness indicated that after purchase of the house, and because of steep slopes existing to the front and side of the house, severe erosion was occurring. The Applicant was unable to get grass to grow as the earth would continuously wash away. Additionally, on the side of the house the slope was so severe it was almost impossible to walk or stand on that side of the property (Attachment 6 photos). In order to control the erosion problem, the Applicant constructed a stone retaining wall that begins at the driveway and continues across the front of the house and around the left side to the rear property line. At the corner of the property the wall is approximately 4 feet in height and abuts the sidewalk. That corner is the highest point of the retaining wall and it diminishes in height as one moves away from the corner of the lot in two directions. According to the witness the retaining wall will prevent further erosion and improve safety.

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The Applicant stated that a request for approval was denied by the subdivision's Homeowner's Association. The reason for denial was a little vague and, in summary, was based on lack of personnel to review the request during the transition of the Association from the developer to the community. The Applicant's house is at the end of the development and everything is uphill from the Applicant's home. The Applicant and the witness did not know they needed a permit and believed the wall would solve a severe erosion and safety problem. The witness admitted that removal of the wall would result in recreating the same erosion issues that existed prior to its erection.

The Department of Planning and Zoning has recommended approval of the Applicant's request subject to several conditions. Importantly, even though the Applicant requested a variance to allow a wall more than 4 feet in height within the front yard setback, the Department points out that the wall is under four feet and there is no necessity for that variance (page 4 of 4, Staff Report dated March 14, 2002). As to the location of the wall within the easement, the Department of Public Works, by memo dated January 14, 2002, indicated that the wall that is constructed on the eastern property line will not effect drainage negatively; that there were no utilities in the easement; and that DPW had no objection to the wall remaining in place subject to two conditions. First, that if the wall ever does create a drainage problem it will be immediately removed at the homeowner's expense and secondly, that the wall extend no further than 20 feet west of the southeast corner of the property and that no other structures be erected or placed in the western easement or the rear yard easement (Attachment 9).

Mr. John Cooper appeared in opposition to the subject request. The witness lives 8 doors away from the subject parcel and expressed concerns regarding stability of the wall, yard and whether sediment would result. No specific facts were presented by the witness to support his contentions. The witness did state that the homeowner/Applicant did not contact Bob Ward, the builder in regard to the drainage and erosion problems. Additionally, the Homeowner's Association has denied the appeal of the homeowner's request to erect this wall. According to the witness, Christie Joyce from the Department of Planning and Zoning inspected the property and wall and said that excess sediment is resulting and will ultimate fill the storm water control pond to the rear of the Applicant's home.

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The Department of Planning and Zoning, through the testimony of the Department representative, denied any knowledge of these statements or conclusions. Mr. Cooper admitted that there are drainage and erosion problems on this property but was unable to offer a solution.

Erica Grden appeared as the property manager of the Woodland Run Annex and stated that she is employed by MRA. According to the witness another homeowner had issues with drainage and erosion and that the builder corrected that problem. In her opinion, this homeowner should have contacted the builder and worked with the builder to effectuate repair of the problem. The witness could not state whether the builder could have corrected the problems on the Homeowner's property in a manner different than that effectuated by the Applicant and doubted that the builder would do anything at this point. The witness felt that a retaining wall like this is out of character for the neighborhood.

### **CONCLUSION:**

The Applicant, Mary Price, is requesting a variance, pursuant to Section 267-26C(4) and Section 267-26C(6) of the Harford County Code, to allow an existing retaining wall within the required front yard and recorded easement in an R2/Urban Residential District.

The Hearing Examiner notes at the onset that the request for a variance pursuant to Section 267-26C(4) is not necessary. The only remaining request is for a variance pursuant to Section 267-26C(6) to allow a structure within a recorded easement. Section 267-26C(6) of the Harford County Code provides as follows:

“No accessory use or structure, except fences, shall be located within any recorded easement area.”

Variances of this nature may be approved by the Board of Appeals pursuant to Section 267-11 of the Harford County Code, provided it finds by reason of the uniqueness of the property or topographical conditions that literal enforcement of the Code would result in practical difficulty and undue hardship. Further, the Applicant must show that the request will not be substantially detrimental to adjacent properties or will not materially impair the purpose of the Code or the public interest.

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The Hearing Examiner notes that the local Homeowner's Association may have certain responsibilities regarding approval or denial and ultimate allowance of structures within the community it is charged to serve; however, the Hearing Examiner must apply the provisions of the Harford County Zoning Code in determining whether the Applicant's request should be approved or rejected.

In the instant case the property owner was faced with a unique topographical problem that caused severe erosion and drainage problems on the property. While it is true that the Applicant did not go to the builder for help (unrebutted testimony was that another property owner with similar problems did seek help from the builder and it took 1-½ years to correct) the Applicant did not believe, based on the experience of another neighbor, that the builder would be responsive in a timely manner. All of the witnesses, both for and against this Application admitted that the property has severe drainage and erosion issues but none of them, other than the property owner, offered any solution. There was no evidence presented that this wall at this location would create any adverse impacts on adjacent property owners. In fact the only uncontroverted testimony in this regard was that this wall is preventing what was a severe drainage and erosion problem that impacted not just the Applicant's property but adjacent and "downstream" properties as well. The Department of Public Works examined the site and concluded that the wall did not create drainage problems and recommended allowing the wall to remain.

The Maryland Court of Special Appeals has provided guidance in matters of variance requests and described a two-step analysis in determining whether such requests should be granted. According to the guidance provided by the Court, the variance process is a two-step sequential process:

1. The first step requires a finding that the property whereon structures are to be placed (or uses conducted) is, in and of itself, unique and unusual in a manner different from the nature of surrounding properties such that the uniqueness or peculiarity of the property causes the zoning provision to impact disproportionately upon the property. If this finding cannot be made, the process stops and the variance must be denied. If, however, the first step results in a supportive finding of uniqueness or unusualness, then the second step in the process is taken.
2. The second step is a demonstration whether unreasonable hardship (or practical difficulty) results from the disproportionate impact of the ordinance caused by the property's uniqueness exists." Cromwell v. Ward, 102 Md. App. 691 (1995).

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The Applicant has demonstrated that the property is unusual and different compared to surrounding properties. This parcel suffers severe drainage and erosion problems not common to all properties in the neighborhood and that demands some type of mitigation. The request is for a wall to be located within an existing easement. There are no utilities in this easement and the Department of Public Works has no objection to the wall remaining in place so long as it does not, in the future, create drainage or erosion problems such that it should be removed. Thus, the purpose of the ordinance is served and not impaired in any way. Lastly, the Hearing Examiner has substantial concerns that removal of the wall could result in severe environmental damage due to erosion and drainage that would then be uncontrolled.

Recognizing that any decision in a zoning context does not operate as a mandate for Homeowner's Association approval, the Hearing Examiner, for the foregoing reasons, recommends approval of the Applicant's request, subject to the following conditions:

1. The Applicant shall obtain all necessary permits and inspections for the existing wall and its completion.
2. If at any time the wall is determined by any State, federal or local agency of government to be the cause of undesirable drainage or erosion problems, or if it is determined that utilities cannot be placed or serviced in the easement without removal of the wall, it shall be immediately removed at the expense of the homeowner.
3. The retaining wall shall extend no further than 20 feet west of the southeast corner of the lot. No structures shall be allowed in the western property line easement or the rear yard easement.

Date: MAY 8, 2002

William F. Casey  
Zoning Hearing Examiner